No. 12,578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Frank Rieber, Inc.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

Opinion Below.

The only opinion rendered by the District Court is its unreported Order Remanding Review to Referee. [R. 34-35.]

Jurisdiction.

This proceeding arose in the United States District Court for the Southern District of California, Central Division, upon an involuntary petition in bankruptcy filed on June 7, 1946, pursuant to Section 59 of the Bankruptcy Act, as amended, by certain creditors of Frank Rieber, Inc., a California corporation with its principal place of business at Los Angeles, California. [R. 2-5.] An order of general reference was entered on the same date [R. 6],

and an order adjudicating Frank Rieber, Inc., bankrupt was entered on June 24, 1946. [R. 7.] Jurisdiction of the court below is conferred by Section 2 of the Bankruptcy Act, as amended, and Section 24, Nineteenth, of the Judicial Code. Under date of May 25, 1949, the referee in bankruptcy entered an order allowing in part, with interest to the date of bankruptcy, certain tax claims of the United States, disallowing the balance of such tax claims, and disallowing the claim of the United States for interest from the date of bankruptcy to the date of payment on those of its tax claims which were secured at the date of bankruptcy by recorded liens on the property of the bankrupt. [R. 20-24.] Pursuant to extensions of time granted therefor [R. 32-34], a petition for review of the order of the referee entered May 25, 1949, was duly filed by the United States on July 28, 1949. [R. 26-28.] On April 20, 1950, the District Court entered an "Order Remanding Review to Referee" in which it affirmed in part and reversed in part the order of May 25, 1949. [R. 34-35.] Notice of appeal from this order of the District Court was duly filed by the United States on May 19, 1950, pursuant to Section 25(a) of the Bankruptcy Act, as amended. [R. 36.] Jurisdiction of this Court to hear and determine this appeal is conferred by Section 24(a) of the Bankruptcy Act, as amended, and 28 U. S. C., Section 1291.

Question Presented.

The only question involved is whether the United States is entitled to receive interest to date of payment on unpaid taxes which were secured by recorded liens prior to bankruptcy, instead only to the date of bankruptcy as held by the court below.

Statutes Involved.

The pertinent provisions of the Internal Revenue Code and the Bankruptcy Act are printed in the Appendix, *infra,* pages 1-5.

Statement.

This appeal arises out of an involuntary proceeding in bankruptcy against Frank Rieber, Inc., a California corporation, which was adjudicated bankrupt on June 24, 1946. [R. 7.] The matter here in controversy arises out of certain claims filed with the trustee in bankruptcy by the Collector of Internal Revenue for the Sixth Collection District of California covering unpaid federal taxes owed by the bankrupt for periods prior to bankruptcy, to which claims the trustee objected. Most of the facts relating to the claims of the United States for unpaid taxes were covered by stipulations of the parties. [R. 8-20.] By their stipulation [R. 8-18], and an amendment thereto [R. 19-20], the parties agreed to the kind and correct amount of unpaid taxes due for the several periods covered by the Collector's claims, leaving for determination by the referee only two questions relating to the allowance of interest due the United States on the agreed tax liability of the bankrupt for the periods involved. One of these issues since has been concluded in favor of the United States by the District Court [R. 34-35], leaving for determination on this appeal only the question whether the United States is entitled to interest to the date of payment, or only to the date of bankruptcy as held by the referee [R. 20-24] and the court below [R. 34-35], on that portion of its tax claims which was secured by duly recorded liens on the property of the bankrupt prior to bankruptcy. With respect to this issue it was stipulated by the parties

that an order was entered in the court below on August 9, 1946, regarding certain tax liens wherein it was determined that the bankrupt estate's liability to the United States, as set forth below, was "secured by duly recorded and valid liens on certain real property belonging to the bankrupt estate," and that "such liens were entitled to priority" [R. 8-10]:[1]

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[1]Paragraph III of the stipulation [R. 8-9] indicates that the United States had a valid recorded lien for Federal Insurance Contribution Act taxes for the second quarter of 1946 in the sum of $196.90 mentioned in paragraph VIII of the stipulation, which would not be due until after the date of bankruptcy [R. 10]. However, the order of August 9, 1946, which is attached as Exhibit H to the affidavit of Eugene Harpole, special attorney for the Bureau of Internal Revenue, in support of the motion presented to this Court on September 25, 1950, for leave to supplement the record on appeal herein, indicates instead that the United States had a lien, dated May 14, 1946, for the $1,100.98 federal unemployment taxes for the year 1945 mentioned in paragraph IX of the stipulation. [R. 10-11.] Also, it will be noted that the amounts shown in the order of August 9, 1946, vary slightly from the amounts shown in paragraphs IV, V, VI, VII, and IX of the stipulation [R. 9-11], the difference no doubt being the result of an agreement of the parties as to the correct amount of tax and interest to June 7, 1946, with respect to each amount and period involved. In form the stipulation is an agreement as to the amount and kind of tax for each period with interest to date of bankruptcy, with the lesser amount in each instance representing the correct amount of tax due upon which interest, if held to be allowable, would be computed from date of bankruptcy.

Kind of taxes	Period involved	Amount
Excise	Dec., 1945, through April, 1946	$ 3,287.54
Federal Insurance Contributions	4th quarter, 1945	926.72
Federal Insurance Contributions	1st quarter, 1946	1,348.90
Withholding	1st quarter, 1946	7,174.48
Total		$12,737.64[2]

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[2]Except for the form of the stipulation the sum of $1,100.98 referred to in paragraph IX of the stipulation [R. 10-11] should be added to this amount rather than the $196.90 referred to in paragraph VIII of the stipulation. [R. 10.]

The order of August 9, 1946, further ordered that the real property subject to the tax liens of the United States be sold free and clear and that the liens of the United States be transferred to the proceeds of the sale. [R. 9.]

The question reserved by the parties in their stipulation for decision of the referee in bankruptcy, so far as the above tax claims are concerned, was whether the Government is entitled to interest on these secured claims at the rate of six per cent per annum until paid or only to June 7, 1946, the date of the petition in bankruptcy was filed. In an order entered May 25, 1949 [R. 20-24], allowing the above and other claims of the United States for unpaid taxes and interest in the aggregate amount of $28,599.51, the referee in bankruptcy allowed interest on the above secured claims only to June 7, 1946, the date of bankruptcy. The United States filed a petition for review of this order to the extent, among other things, that the referee denied the Government's claim for interest to the date of payment on its claims for taxes which were secured by duly recorded liens. [R. 26-28.] In an "Order Remanding Review to Referee" entered April 20, 1950, the court below affirmed this part of the order of the referee in bankruptcy. [R. 34-35.] This appeal is from that portion of the order of April 20, 1950. [R. 36.]

While this Court may find the facts just stated, all from the printed record on review herein, sufficient to determine the legal question involved the United States nevertheless has filed a motion, which was taken under advisement by

this Court following a hearing thereon on September 25, 1950, to supplement the record on appeal to include certain documentary evidence which was before the referee in bankruptcy at the time he entered his order of May 25, 1949. These additional records, which were not referred to in the referee's certificate on review [R. 28-31], show, among other things, that the real property of the bankrupt to which the Government's liens attached was sold free and clear of such liens for the sum of $52,000, and that at the time of the trustee's first report and account (filed October 4, 1946) of personal property of the bankrupt (to which the Government's liens also attached under Section 3670 of the Internal Revenue Code) had already been sold for an amount in excess of $45,000. See Exhibits B, C, F, G, I and J attached to the affidavit in support of the foregoing motion to supplement the record on appeal herein.

Statement of Points to Be Urged.

The United States relies upon the following errors as a basis for this appeal [R. 37-38]:

The District Court erred in holding that the United States is entitled to interest on its tax claims which were secured by valid liens filed prior to the date of bankruptcy only to the date of bankruptcy and in failing to hold that the United States is entitled to interest on such secured claims to the date of payment of such claims.

Summary of Argument.

As a general rule, a creditor of a bankrupt is entitled to interest on his claim only to the date of bankruptcy. There is an exception to this rule, however, in the case of a secured creditor. A secured creditor is entitled to have his claim paid in full with interest to the date of payment if the security is sufficient.

A lien of the United States for unpaid taxes is entitled in bankruptcy proceedings to the same dignity as any other lien upon property of the bankrupt, and under settled principles of law the United States was entitled to interest on its lien claims to date of payment. The liens of the United States for unpaid taxes in this case were liens upon all of the property and rights to property of the bankrupt, not just upon the real property sold free and clear, and the value of the property covered by the liens of the United States was sufficient to pay its lien claims in full. Accordingly, the referee and the court below erred in refusing to allow interest on the secured claims after the date of bankruptcy.

ARGUMENT.

The United States Is Entitled to Receive Interest to the Date of Payment on Such of Its Tax Claims as Were Secured by Valid Recorded Liens Prior to Bankruptcy.

It seems now too well settled for extended argument, both by the decision of this Court in *United States v. Sampsell,* 153 F. 2d 731, and by numerous other decisions, that a secured creditor is entitled in a bankruptcy proceeding to payment of his claim in full with interest to the date of payment if the security is adequate for that purpose. See *Coder v. Arts,* 152 Fed. 943 (C. A. 8th), affirmed 213 U. S. 223; *Oppenheimer v. Oldham,* 178 F. 2d 386 (C. A. 5th); *Georgia, Florida & Alabama R. Co. v. Bankers Trust Co.,* 170 F. 2d 733 (C. A. 5th); *In re Chicago, R. I. & P. Ry. Co.,* 155 F. 2d 889 (C. A. 7th); *Wilson v. Dewey,* 133 F. 2d 962 (C. A. 8th); *Sehon-Stevenson & Co. v. Union Trust Co.,* 113 F. 2d 968 (C. A. 4th); *In re Gotham Can Co.,* 48 F. 2d 540 (C. A. 2d); *Mortgage Loan Co. v. Livingston,* 45 F. 2d 28, 34 (C. A. 8th);[3] *People's Homestead Ass'n v. Bartlette,* 33 F. 2d 561 (C. A. 5th); *Phoenix Bldg. & Homestead Ass'n v. E. A. Carrere's Sons,* 33 F. 2d 563 (C. A. 5th); *San Antonio Loan & Trust Co. v. Booth,* 2 F. 2d 590 (C. A. 5th); *In re Bowen,* 46 Fed Supp. 631 (E. D., Pa.); *In re Alpine Petroleum Corp.,* 41 Fed. Supp. 682 (E. D.,

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[3]See, also, *Mortgage Loan Co. v. Livingston,* 78 F. 2d 517, 521 (C. A. 8th), certiorari denied, 296 U. S. 607.

N. Y.); *In re Chicago & N. W. Ry. Co.,* 35 Fed. Supp. 230, 254 (E. D., Ill.), affirmed 126 F. 2d 351 (C. A. 7th), certiorari denied 318 U. S. 793; *In re Fabacher,* 193 Fed. 556 (E. D., La.).[4] Compare *Board of Com'rs of Sweetwater County, Wyo., v. Bernardin,* 74 F. 2d 809, 815 (C. A. 10th), certiorari denied 295 U. S. 731. Not only did the Supreme Court specifically hold, in affirming the decision of the Court of Appeals for the Eighth Circuit in *Coder v. Arts, supra,* that a secured creditor is entitled to interest until date of payment, but in *Louisville Bank v. Radford,* 295 U. S. 555, 597, it cited with approval some of the above decisions. Further, the right to post-bankruptcy interest on secured claims seems clearly to have been recognized by the Supreme Court in *Vanston Committee v. Green,* 329 U. S. 156, where the question was whether the secured creditors were entitled to interest on unpaid interest accruing after bankruptcy where the security was adequate to pay such interest on interest. See, also, *Georgia, Florida & Alabama R. Co. v. Bankers Trust Co.,* 170 F. 2d 733 (C. A. 5th), and *Delatour v. Prudence Realization Corp.,* 167 F. 2d 621 (C. A. 2d), affirming *In re Espade Realty Corp.,* 66 Fed. Supp. 683 (E. D., N. Y.). As the Court of Appeals for the Seventh Circuit

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[4]In *United States v. Sampsell, supra,* this Court pointed out (p. 736) that there is some divergence of opinion as to whether post-bankruptcy interest is payable only to the date of sale of the security or to the date of payment of the secured claim, but it will be seen from the cases cited above that the weight of authority recognizes the right of the secured creditor to receive payment of the full amount of his claim, with interest to the date of payment.

said in *In re Chicago, R. I. & P. Ry. Co., supra,* page 892:[5]

> We think it has never been successfully contended in bankruptcy proceedings that a secured creditor is not entitled to interest accruing up to the time of payment to him, if the encumbered assets are sufficient to satisfy his entire claim. As has been suggested, any other result would lead to destruction of valid liens. * * *

While this is an exception to the general rule that in bankruptcy proceedings interest on claims will be allowed only to the date of bankruptcy *(United States v. Sampsell, supra),* the reason for allowing post-bankruptcy interest on secured claims is made clear in the above decisions. A lien against the property of a bankrupt recognized as valid by either federal or state law attaches to the property in the hands of the trustee after bankruptcy, unless invalidated under some specific provision of the Bankruptcy Act. The trustee acquires no better title than the bankrupt had. He administers the bankrupt estate for the benefit of the general creditors, not for the benefit of the secured creditors. Before amendment by the so-called

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[5]This case holds that when liens are of different dignity, claims of higher rank will be paid in full with interest during receivership, even though no assets are available to pay those of lower grade. The first report and account of the trustee in the instant case [Ex. I, p. 12, attached to motion to supplement record] reports payment of prior and secured claims and charges paid through escrow totaling $35,150.96. Assuming these secured claims were entitled to priority over liens of the United States, the balance of the proceeds from the sale of the bankrupt's real property alone would be sufficient to pay the interest due the United States.

Chandler Act of 1938,[6] Section 67 of the Bankruptcy Act[7] specifically provided that liens given or accepted in good faith, and not in contemplation of or in fraud upon the provisions of the Act, and for a present consideration, should, to the extent of the present consideration, not be affected by anything in the Bankruptcy Act. See *In re Knox-Powell-Stockton Co.,* 100 F. 2d 979 (C. A. 9th). While this specific provision was deleted in the Chandler Act revisions, the principle is retained in Section 70 of the Act, as amended, when considered in connection with Section 67, as amended. (Appendix, *infra.*) *In re Van Winkle,* 49 Fed. Supp. 711, 713 (W. D., Ky.), and cases cited.

In this case the referee in bankruptcy found that the United States had valid and recorded liens prior to bankruptcy for, and was entitled to priority in payment of, certain unpaid excise, federal insurance contribution, and withholding taxes. [R. 8-9.][8] He allowed these claims, along with certain other tax claims for which the United States did not have liens, with interest at the statutory rate of six per cent[9] to the date of bankruptcy on all claims

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[6]Act of June 22, 1938, Chap. 575, 52 Stat. 840, Sec. 1 (11 U. S. C., 1946 Ed., Sec. 107).

[7]Chap. 541, 30 Stat. 544.

[8]See footnotes 1 and 2, *supra.*

[9]Interest on such unpaid taxes is imposed by Section 294 of the Internal Revenue Code, Appendix, *infra,* from the date the taxes are due until they are paid. See, also, Section 292 of the Code, Appendix, *infra,* relating to interest on deficiencies determined under Section 272 of the Code.

allowed, but denied the claim of the Government for interest to the date of payment on the taxes which were secured by liens prior to bankruptcy. [R. 20-25.] The District Court sustained his disallowance of post-bankruptcy interest on the Government's secured claims for taxes. [R. 34-35.]

In view of the settled law as we see it we find no basis for the decision of the referee and the court below in this case. The referee gave no reason for disallowing the Government's claim for post-bankruptcy interest on the taxes covered by liens, although he found the liens valid and held that the Government was entitled to priority. The District Court did not question the validity of the liens or the right of the Government to priority in payment. Its only observation with respect to post-bankruptcy interest on the secured tax claims in its "Order Remanding Review to Referee" [R. 34] was [R. 35]:[10]

> Under the first question I hold with the referee. I do not consider the case of *Sampsell v. United States,* 153 F. 2d 731, applicable to the present situation. In the *Sampsell* case I was dealing with mortgaged property that was sufficient to pay the debt in full and to have held that the interest stopped upon an adjudication in bankruptcy would have destroyed the contractual lien rights of the mortgagee. I feel the first question is controlled by the case of *City of New York v. Saper, Trustee in Bankruptcy,* 336 U. S. 328.

It is not clear from this statement whether the court was of the opinion that a contractual lien has greater dignity

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[10]Judge Ben Harrison also decided the *Sampsell* case in the District Court.

in a bankruptcy proceeding than a duly perfected and recorded statutory lien for unpaid taxes, or whether the decision was based upon an assumed limitation of funds in the estate subject to the tax liens of the United States. Neither proposition has any merit, we submit.

Any assumption that valid recorded statutory liens for federal taxes are of lesser dignity than a valid contractual lien cannot be supported by the authorities. If *New York v. Saper,* 336 U. S. 328, cited in the above statement, has any bearing whatever here it is authority to the contrary. The tax claims involved in that case, like some of the tax claims allowed in the instant case, were unsecured claims. They were not protected by valid recorded liens, as were the claims with which we are presently concerned, and the decision of the Supreme Court cannot be accepted as authority for the proposition that interest is not allowable beyond the date of bankruptcy on secured tax claims. On the other hand, the decision in that case is authority for the proposition that in a bankruptcy proceeding tax claims are to be treated on an equal basis with all other claims so far as the allowance of interest is concerned. After rejecting the long-established practice of allowing post-bankruptcy interest on tax claims against the bankrupt estate, the Supreme Court said of the Bankruptcy Act as it now stands (pp. 337-338):

> The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after these amendments to Sections 64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest [citations] as well as Section 63's limitations of interest on other claims

> to date of bankruptcy, they compel our conclusion, already stated, that the statute as amended did not contemplate any exception in favor of tax claims.

New York v. Saper, supra, dealt only with post-bankruptcy interest on unsecured claims. But if unsecured tax claims are to be "assimilated" to other unsecured claims for the purpose of allowing interest then there is no reason why secured tax claims should not be assimilated to other secured claims in determining whether post-bankruptcy interest should be allowed. We know of no authority to the contrary. Compare *Oppenheimer v. Oldham, supra,* p. 389.

That perfected liens of the United States for unpaid taxes are entitled to the same dignity in bankruptcy proceedings as contract liens is still further supported by the decision of the Supreme Court in *Goggin v. California Labor Div.,* 336 U. S. 118. A lien for federal taxes has all the dignity of a mortgage or other contractual lien. Before enactment of the Act of March 4, 1913, Ch. 166, 37 Stat. 1016, amending Section 3186 of the Revised Statutes, the rights of the United States under such liens were not even affected by the recordation laws of the states. See *United States v. Snyder,* 149 U. S. 210.

The provisions of Section 3186 of the Revised Statutes, as amended, are incorporated in Sections 3670 and 3671 of the Internal Revenue Code (Appendix, *infra*) under which the liens here arose. Section 3672 (Appendix, *infra*) (based on the Act of March 4, 1913, as amended) provides that liens of the United States for taxes shall not be valid as against a mortgagee, pledgee, purchaser, or judgment creditor unless notice of such lien is filed in accordance with the remaining provisions of that section.

In this case the referee found that the liens of the United States for the particular taxes involved in this appeal had been duly recorded in accordance with this latter section and that the United States was entitled to priority in payment of its lien claims. There is nothing in the record, the law, or applicable authorities which would warrant treating these liens, for purposes of the Bankruptcy Act, differently from any other lien perfected prior to bankruptcy.

If the decision below is allowed to stand it would seem to create an inequitable situation not found in other cases involving priority of liens. In other situations a valid recorded lien of the United States for taxes would take priority over a subsequent mortgage, judgment or other valid lien. The same would be true in a bankruptcy (*cf. In re Chicago, R. I. & P. Ry. Co., supra,* p. 892) except for the allowance of interest, but under the decision below the United States would receive interest only to the date of bankruptcy, although its lien was upon all the property of the bankrupt, while a subsequent mortgagee would receive payment of his claim in full, with interest, if the mortgaged property were sufficient.

Neither can the decision below, at least of the referee, be supported on the ground that the security covered by the liens of the United States was inadequate to pay the full amount of the taxes thus secured plus interest to the date of payment. At the time he entered his order of May 25, 1949, the referee had before him all of the records which are attached as exhibits to the affidavit of Eugene Harpole, special attorney for the Bureau of Internal Revenue, in support of the motion submitted to this Court on September 25, 1950, by the United States Attorney for leave to supplement the record on review in this case.

These documents clearly show that at the time the referee entered his order of May 25, 1949, he was fully advised of the fact that the proceeds from the sale of the real property of the bankrupt which he had held subject to the tax liens of the United States, without reference to all other property and rights to property which also was subject to the same tax liens,[11] were more than adequate to pay the secured claims of the United States with interest to the date of payment. Hence, it is only logical to assume that his denial of post-bankruptcy interest on the Government's secured tax claims was based upon some theory that tax liens are to be treated differently under the Bankruptcy Act from other valid liens. This, we believe, we have shown to be fallacious.

Also, it cannot be presumed that by its stipulation of facts relating specifically to the bankrupt's liability for taxes the United States precluded itself from relying upon facts already of record which would support its claim for post-bankruptcy interest. It would seem frivolous to stipulate facts already of record. Also, the stipulation specifically reserved to the parties the right to introduce any additional evidence not inconsistent with the stipulated facts. [R. 8.]

The failure of the referee to mention anything about the value of the security covered by the Government's liens in his certificate on review [R. 28-31] is further indication that his decision was not based on inadequacy of the security to pay the Government's claims in full.

As stated above, it is not clear from the "Order Remanding Review to Referee" [R. 34-35] whether the Dis-

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[11]See Section 3670 of the Internal Revenue Code.

trict Judge based his affirmance of the referee's decision upon a presumed insufficiency of the security covered by the Government liens to pay its claims in full with interest. The District Judge cannot be criticized for basing his conclusions upon the facts submitted to him by the referee's certificate. But since the referee's certificate made no mention of the security, either as to its adequacy or inadequacy to pay the interest which was the subject of his decision, and since such information was readily available to the District Judge if deemed controlling and could have been furnished by the referee on a supplemental certificate, it does not seem logical to assume that his affirmance of the referee's decision on this issue, even considering his reference to the decision in the *Sampsell* case, was based entirely upon inadequacy of the security to pay the Government's secured claims in full. Rather, since the question of adequacy of the security does not seem to have been raised, and in view of the reference to *New York v. Saper,* 336 U. S. 328, it would seem more logical to assume that the District Court intended to decide as a matter of law that the United States is not entitled to post-bankruptcy interest on its secured tax claims.

Also, it is doubtful if a demonstrated inadequacy of the security to pay a secured claim in full with interest is material at this stage of the proceeding. Whether a secured claimant is entitled to post-bankruptcy interest is essentially a question of law. Since a secured creditor is entitled to post-bankruptcy interest as a matter of law the question whether the award of the trustee in a particular case should include such interest depends primarily upon whether the security is sufficient to pay the secured claim in full. While in most of the decisions cited above the security was shown to be adequate to pay the secured

claims in full, that does not seem to have been the controlling consideration. Some of them do not show definitely that the security was adequate to pay the secured claim in full, and in *In re Bowen,* 46 Fed. Supp. 631, 640 (E. D., Pa.), the court held in advance of a determination of the amount available therefor that the secured claimant was entitled as a matter of law to payment of his claim in full with interest if funds therefor should eventually be adequate.

Because of the nature of the question here involved, and because of the equitable nature of bankruptcy proceedings and the piecemeal manner in which legal questions arising in such proceedings must be decided, we believe this Court can decide whether, as a matter of law, the United States is entitled to post-bankruptcy on its secured claims for unpaid taxes.[12] However, in view of the vagueness of the opinion of the District Court it was deemed advisable to request this Court to permit sufficient supplementation of the record on review to supply the necessary data with respect to adequacy of the security to pay the Government's secured claims in full with interest. While this procedure may be somewhat irregular, we submit this Court has the

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[12]This specific question seems not to have been previously decided by any Court of Appeals, presumably because of the practice of allowing such interest prior to the decision of the Supreme Court in *New York v. Saper, supra.* However, the question has arisen in other bankruptcy proceedings. For instance, the referee in bankruptcy entered an order on October 13, 1949, allowing post-bankruptcy interest on tax lien claims of the United States in *In re Big Ben Motors, Inc.,* No. 46,124-Y (S. D. Cal.), and no review was sought; on March 31, 1950, Judge Hall entered a similar order in *In re Ridgecrest Development Co.,* No. 6354 (S. D. Cal.), and no appeal was taken; and on September 19, 1950, Referee Hugh L. Dickson, who decided the question in the instant case, entered an order allowing post-bankruptcy interest on tax lien claims of the United States.

power to grant the Government's motion to supplement the record, and if the additional evidence is material to a determination of the rights of the parties it ought in all equity to be granted.

While not of primary importance in determining the question here involved, it is to be noted that under Section 3670 of the Internal Revenue Code the tax liens of the United States attach to all of the property and rights to property of the taxpayer. Hence, the liens here involved attached not only to the real property of the bankrupt mentioned in the referee's order of August 9, 1946, but to all other property of the bankrupt, which the first report and account of the trustee[13] shows also was adequate to pay the tax liens with interest to date of payment. But this fact is not emphasized, although it would have to be considered if the proceeds from the sale of real property were inadequate to pay the Government's claims in full, because it would require consideration of the further question whether the right of the Government to payment out of the proceeds of the sale of the bankrupt's personal property, not having been accompanied by possession, would be subject under Section 67(c) of the Bankruptcy Act, as amended, to prior payment of costs of administration and wage claims under Section 64(a) of that Act, as amended. (Appendix, *infra.*) Compare *Goggin v. California Labor Div.,* 336 U. S. 118.

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[13]Exhibit I attached to the affidavit in support of the Government's motion to supplement the record herein.

Conclusion.

Under all of the circumstances we submit the decision of the District Court is wrong. It is contrary to the facts and the law and should be reversed.

Respectfully submitted,

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October, 1950.

APPENDIX.

Bankruptcy Act of 1898, c. 541, 30 Stat. 544 [as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1]:

SEC. 64. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *.

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(11 U. S. C. 1946 ed., Sec. 104.)

SEC. 67. *Liens and Fraudulent Transfers.*— * * *

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b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act.

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(11 U. S. C. 1946 ed., Sec. 107.)

Internal Revenue Code:

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. (26 U. S. C. 1946 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(a) *Tax Shown on Return.*—

(1) *General rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

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(26 U. S. C. 1946 ed., Sec. 294.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or

addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Section 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of

such notice in an office within the State or Territory; or

(3) *With clerk of district court of the United States for the District of Columbia.*—In the office of the clerk of the district court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

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(26 U. S. C. 1946 ed., Sec. 3672.)